No. 82-1621

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KIMERLI JAYNE PRING,

Petitioner,

vs.

PENTHOUSE INTERNATIONAL, LTD., A NEW YORK CORPORATION, AND PHILIP CIOFARRI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF BY PETITIONER

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Reply Brief by Petitioner

In their brief in opposition, Penthouse and Respondent Cioffari make first arguments which becloud and conceal the clear constitutional questions raised by this petition which concern the breadth

of license that publishers can constitutionally claim to defame and ridicule all citizens -- public and private figures, famous and obscure persons alike. Penthouse asserts that the simple expedient of some obvious fictional embellishment should serve as a complete defense to the vilest defamation and to any invasion of privacy, no matter how despicable.

Penthouse wields this argument against a young woman from Wyoming whom it chose to ridicule and degrade before its vast readership, transforming her from a decent, fine, private person into a brazen, strutting hussy who performs deviant public sexual acts. Penthouse then adds to this defamation an obvious fiction that Miss Pring's fellatio is of such quality that men are levitated, and seeks immunity for the entire article as a consequence of this gratuitous

addition. It hurts as much and the public shame and the humiliation are as great whether the article is or is not immunized.

1. Penthouse defines the test for its own liability as "...whether any reasonable reader would be left with the impression that the author is asserting false facts about the plaintiff," (Res., p. 23. See also Res., pp. 9, 12, 18, 23, 24.). Yet, it makes first arguments which ignore the fact that the trial judge instructed the jury that before it could find against Penthouse it must first find that the article "contained false statements of fact about the plaintiff." Penthouse also ignores the fact that the jury rendered a special verdict finding that Penthouse "had knowledge of or acted in reckless disregard of whether the published matter would be understood

by a reasonable person as conveying statements of fact about the plaintiff." Please see the discussion in our petition at pages 16 through 18.

2. Next, Penthouse by first arguments characterizes Miss Pring as a public figure which ignores the pretrial determination of Judge Brimmer that Miss Pring was a private figure, and the special finding of the jury that Miss Pring was a private figure.

Finally, in his denial of Penthouse's motion for a new trial, Judge Brimmer reaffirmed his earlier determination that Miss Pring was a private person, not a public figure. This ruling was made after the judge had the benefit of his entire involvement with the case.

3. In first arguments, Penthouse attempts to reargue the question of whether the article was of and concerning

Miss Pring, although the identity of Miss Pring is unmistakable (please see the discussion at page 8 through 10 of Petitioner's brief). More importantly, the issue was specifically determined by the jury by its special verdict finding that "a reasonable man (person) would understand that the plaintiff, Kimerli Jayne Pring, was the person referred to therein."

This ruling by a 5-4 divided court below is at odds with the entire body of general libel law in the country, and, unless this Petition is granted, a new First Amendment immunity against both libel and invasion of privacy will be created for any publisher who wishes to immunize an otherwise actionable publication by including a segment of obvious fantasy within the publication.

The constitutional issue was clearly

stated by Judge Breitenstein of the Tenth Circuit: "Penthouse cannot escape liability by relying on the fantasy used to embellish the fact...Responsibility for an irresponsible and reckless statement of fact, fellatio, may not be avoided by the gratuitous addition of fantasy." (Pet. App. p. 10 - emphasis added)

Respectfully submitted,

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